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Nos. 02-1472 and 03-853

In the Supreme Court of the United States

CHEROKEE NATION OF OKLAHOMA AND SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION, PETITIONERS

v.

UNITED STATES OF AMERICA; TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES

TOMMY G. THOMPSON, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE TENTH AND FEDERAL CIRCUITS

BRIEF FOR THE FEDERAL PARTIES

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QUESTIONS PRESENTED

The Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450-450n, authorizes the Secretary of Health and Human Services (the Secretary) to enter into contracts with Indian Tribes for the administration of programs the Secretary otherwise would administer himself. The ISDA also provides that the Secretary shall pay "contract support costs" to cover certain direct and indirect expenses incurred by the Tribes in administering those contracts. The ISDA, however, makes payment "subject to the availability of appropriations," and declares that the Secretary "is not required to reduce funding for programs, projects or activities serving a tribe to make funds available" for contract support and other self-determination contract costs. 25 U.S.C. 450j-1(b). The questions presented are:

1. Whether the ISDA requires the Secretary to pay contract support costs associated with carrying out self-determination contracts with the Indian Health Service, where appropriations were insufficient to fully fund those costs without reprogramming funds needed for other mandatory health initiatives and for non-contractable, inherently federal functions such as having an Indian Health Service.

2. Whether Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-288, bars the Tribes from recovering their contract support costs.

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OPINIONS BELOW

The opinion of the court of appeals in No. 03-853 (Pet. App. 1a-35a) is reported at 334 F.3d 1075. The relevant opinions of the Interior Board of Contract Appeals (Board) (Pet. App. 43a-49a, 50a-73a) are not officially reported, but are available at 01-1 B.C.A. (CCH) ¶ 31,349, and 99-2 B.C.A. (CCH) ¶ 30,462.

The opinion of the court of appeals in No. 02-1472 (Pet. App. 1a-23a) is reported at 311 F.3d 1054. The opinion of the district court (Pet. App. 24a-50a) is reported at 190 F. Supp. 2d 1248. An earlier decision by the district court denying class certification is reported at 199 F.R.D. 357.

JURISDICTION

The judgment of the court of appeals in No. 02-1472 (*Cherokee*) was entered on November 26, 2002. A petition for rehearing was denied on January 22, 2003 (Pet. App. 51a-52a). The petition for a writ of certiorari was filed on April 3, 2003. The judgment of the court of appeals in No. 03-853 (*Thompson*) was entered on July 3, 2003. A petition for rehearing was denied on September 12, 2003. (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on December 11, 2003, and was granted on March 22, 2004. The petition in No. 02-1472 was granted the same day, and the cases were consolidated. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, and the applicable appropriations acts are reproduced at *Thompson* Pet. App. 81a-115a.

STATEMENT

I. Statutory Background

Congress enacted the Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, 88 Stat. 2203, in 1975 to promote "effective and meaningful participation by the Indian people in the planning, conduct, and administration" of federal programs and services for Indians. 25 U.S.C. 450a(b). Until that time, federal programs and services for Indians were primarily administered directly by the federal government. See S. Rep. No. 274, 100th Cong., 1st Sess. 2-3 (1987). Under the ISDA, Indian Tribes may elect to enter into "self-determination contracts" with the Secretary of the Interior and the Secretary of Health and Human Services to assume operation of services for Indians otherwise administered directly by those Departments. 25 U.S.C. 450f. By 1998, about half of the Departments' com-

bined appropriations for Indian programs was administered by Tribes pursuant to self-determination contracts. GAO, *Indian Self-Determination Act: Shortfalls in Indian Contract Support Costs Need to Be Addressed* (*GAO Report*) 5 (1999).

The Secretary of each Department has delegated authority to enter into self-determination contracts to the agency within the Department responsible for administration of Indian programs: the Bureau of Indian Affairs (BIA) in the Department of the Interior, and the Indian Health Service (IHS), an agency within the Public Health Service in the Department of Health and Human Services. The contracts at issue in this case are with the Secretary of Health and Human Services (the Secretary) through IHS. IHS is responsible for delivering primary health care services to federally recognized Tribes and their members. 25 U.S.C. 1661.

A. General Provisions Of The ISDA

1. The ISDA directs the Secretary, "upon the request of any Indian tribe by tribal resolution, to enter into a self-determination contract" to "plan, conduct, and administer programs or portions thereof." 25 U.S.C. 450f(a)(1). "Self-determination contracts with Indian tribes are not discretionary. The Act contains only limited reasons for declination to contract by [the] Secretary." S. Rep. No. 274, *supra*, at 3. In particular, the Secretary is required to approve a tribe's proposed self-determination contract within 90 days unless the Secretary issues a written finding "clearly demonstrat[ing]" that the proposal is deficient according to certain specified declination criteria. 25 U.S.C. 450f(a)(2). As a result, the Act "uniquely requires the Secretary * * * to continue providing direct services until such time as a tribe freely chooses to contract to operate those services." S. Rep. No. 274, *supra*, at 6.

The ISDA authorizes Tribes to assume not only the direct delivery of services but also "administrative functions * * *

that support the delivery of services." 25 U.S.C. 450f(a)(1). Those "administrative functions * * * shall be contractable without regard to the organizational level within the Department that carries out those functions." *Ibid.*; see 25 U.S.C. 450j-1(a)(1). At the same time, the ISDA makes clear that certain agency responsibilities are "beyond the scope of programs, functions, services, or activities" that are contractable, "because [they] include[] activities" that must be conducted by the agency and "cannot lawfully be carried out by the contractor." 25 U.S.C. 450f(a)(2)(E); see 25 U.S.C. 450f(a)(1) (providing for assumption by contracting Tribe of "administrative functions * * * that are *otherwise contractable*") (emphasis added); 25 U.S.C. 450j-1(a)(1) (allowing for funding of "administrative functions that are *otherwise contractable*") (emphasis added).

2. The ISDA thus effectively entitles a tribe to step into the shoes of a federal agency in receiving federal funds and administering government services. The statute recognizes that the unique, government-to-government nature of self-determination contracts differs from standard government procurement contracts. See 25 U.S.C. 450b(j) ("no [self-determination] contract * * * shall be construed to be a procurement contract"); S. Rep. No. 274, *supra*, at 18 ("The term 'self-determination contract' means an intergovernmental contract that is not a procurement contract. This definition recognizes the unique nature of self-determination contracts between the Federal government and Indian tribal governments.").

Unlike a typical procurement contractor, a Tribe that elects to enter into a self-determination contract under the ISDA does not commit to supply a specific level of services in exchange for an agreed-upon payment. Instead, the tribe, like the federal agency before it, undertakes to deliver federal services within the limits of funds awarded to it and has no obligation to "continue performance that requires an ex-

penditure of funds in excess of the amount of funds awarded." 25 U.S.C. 450*l*(c) (Model agreement § 1(b)(5)); see, *e.g.*, J.A. 79. In recognition of the distinctive manner in which contracting Tribes assume the delivery of government services, the ISDA deems employees of contracting Tribes to be part of the Department of Health and Human Services for purposes of the Federal Tort Claims Act while carrying out the services. See 25 U.S.C. 450f(d).

3. In 1988, Congress added a "Tribal Self-Governance Demonstration Project" to the ISDA, enabling participating Tribes to step further into the shoes of a federal agency. Pub. L. No. 100-472, § 209, 102 Stat. 2296 (25 U.S.C. 450f note (1994)) (adding ISDA Tit. III). The project authorized a limited number of Tribes, each of which had performed multiple self-determination contracts for three fiscal years, to enter into an overarching self-governance "compact," under which the Tribe could redesign its contracted programs and reallocate funding among programs. Although the self-governance project initially applied only to BIA, Congress extended the project to IHS in 1992. Pub. L. No. 102-573, Tit. VIII, § 814, 106 Stat. 4590. Subsequently, Congress repealed the demonstration project and permanently codified self-governance provisions for BIA (in 1994) and IHS (in 2000) as Titles IV and V of the ISDA, respectively. Pub. L. No. 103-413, Tit. II, § 204, 108 Stat. 4271 (1994) (codified as amended at 25 U.S.C. 458aa to 458hh); Pub. L. No. 106-260, § 4, 114 Stat. 712 (2000) (codified at 25 U.S.C. 458aaa to 458aaa-18).

Funding under self-governance compacts is provided through annual funding agreements subject to the same funding provisions that apply to self-determination contracts. See 25 U.S.C. 458aaa-7(c) (permanent IHS self-governance provisions); 25 U.S.C. 458cc(*l*) (permanent BIA self-governance provisions); Pub. L. No. 100-472, § 209, 102 Stat. 2296 (adding ISDA § 303(a)(6) (self-governance demonstra-

tion project)). Accordingly, while this case involves self-governance compacts, the funding provisions for self-determination contracts control. See *Thompson* Pet. App. 7a; *Cherokee* Pet. App. 2a n.1.

B. Funding Of Self-Determination Contracts Under The ISDA

With respect to the amount of funds provided to a Tribe that elects to assume operation of a federal program, the ISDA, as originally enacted, provided for transferring the amount that the Secretary would have allocated to the program if he were still administering it directly. 25 U.S.C. 450j-1(a)(1) ("amount of funds provided * * * shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs"); see Pub. L. No. 93-638, § 106(h), 88 Stat. 2211. That base amount of funding is sometimes referred to as the "secretarial amount." See, *e.g.*, *Thompson* Pet. App. 4a.

1. a. In 1988, Congress amended the ISDA and directed the Secretary to add to the secretarial amount an amount for "contract support costs" (CSCs). 25 U.S.C. 450j-1(a)(2). CSCs are costs that a Tribe incurs in operating a program but that the Secretary would not incur if he were directly administering the program. 25 U.S.C. 450j-1(a)(2). By definition, therefore, funding for CSCs is over and above what the Secretary would require to operate the same program directly. Such costs would include certain employment taxes and expenses to which the federal government is not subject, and costs that non-federal entities must incur when contracting with the federal government to ensure compliance and accountability.

CSCs can include both direct costs and indirect costs. 25 U.S.C. 450j-1(a)(3)(A). Direct CSCs may include, for example, initial startup expenses, unemployment taxes, and workers compensation payments. See J.A. 12-13. Indirect CSCs comprise an allocable share of general overhead

expenses incurred by a Tribe across its various activities and programs (*i.e.*, for facilities, equipment, and financial and personnel management), except insofar as such expenses are already accounted for in funds for ordinary administrative activities that are transferred to the Tribe as part of the secretarial amount. 25 U.S.C. 450j-1(a)(3)(A)(ii); see J.A. 13-14. Indirect CSCs make up the majority of CSCs, see *GAO Report* 6, and are generally calculated by applying an "indirect cost rate" to the amount of funds otherwise payable to the Tribe, see 25 U.S.C. 450b(f) and (g), 450j-1(c)(3); *Thompson* Pet. App. 7a-8a; see also OMB, Circular No. A-87, 46 Fed. Reg. 9548 (1981).

b. At the same time that it provided for funding of CSCs in the 1988 amendments, Congress also prescribed an overarching limitation on the Secretary's obligation to provide funds to a tribe under a self-determination contract. Pub. L. No. 100-472, § 205, 102 Stat. 2293 (codified as amended at 25 U.S.C. 450j-1(b)). That provision states:

> Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter.

25 U.S.C. 450j-1(b); 25 U.S.C. 458aaa-18(b) (same) (enacted as part of IHS self-governance provisions in 2000). In addition, Congress, anticipating that appropriations may be insufficient for for full funding of CSCs for all Tribes, directed the Secretary to submit an annual report setting out, *inter alia*, "an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year." 25 U.S.C. 450j-1(c)(2); see Pub. L. No. 100-472, § 205, 102 Stat. 2293.

2. Congress added a "model agreement" to the ISDA in 1994, the terms of which must be contained or incorporated

in "[e]ach self-determination contract." 25 U.S.C. 450*l*(a); see Pub. L. No. 103-413, § 108, 108 Stat. 4261. The model agreement provision addressing funding amounts states that: "*Subject to the availability of appropriations*, the Secretary shall make available to the Contractor the total amount specified in the annual funding agreement." 25 U.S.C. 450*l*(c) (Model agreement § 1(b)(4)) (emphasis added).

II. The Indian Health Service's Appropriations And Funding

IHS provides health care services for over 1.6 million American Indians and Alaska Natives, who belong to more than 500 Indian Tribes. IHS services are delivered through approximately 150 local "service units" encompassing some 500 direct health care facilities, including 49 hospitals, 195 health centers, eight school health centers, and 289 health stations, satellite clinics and Alaska village clinics. J.A. 219 ¶ 20. As of 1998, approximately 45% of IHS's funding for programs was administered by Tribes through self-determination contracts. *GAO Report* 37.

A. IHS's Allocation Of Appropriations Generally

IHS allocates and spends its appropriated funds principally under the authority of the Snyder Act, 25 U.S.C. 13, and the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. 1601 *et seq.*[1] Congress appropriates funds for IHS health care programs through an annual lump-sum appropriation for "Indian Health Services." See, *e.g.*, Department

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[1] The Snyder Act authorizes IHS to "direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States * * * [f]or relief of distress and conservation of health." 25 U.S.C. 13. The IHCIA, which is intended to "assure the highest possible health status for Indians," 25 U.S.C. 1602(a), authorizes appropriations in a number of health-related areas and establishes several health programs. See 25 U.S.C. 1621; see generally 25 U.S.C. 1601-1616p.

of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, Tit. II, 110 Stat. 3009-205, 3009-212.[2] In the relevant fiscal years, IHS's lump-sum appropriation for Indian Health Services ranged from $1.65 billion (1994) to $1.81 billion (1997). J.A. 213 ¶ 3, 384 ¶ 4.

The agency allocates a small share of the lump-sum appropriation to its Headquarters Office, with the remaining funds allocated to twelve Area Offices responsible for administering programs within a defined geographic region. J.A. 385 ¶ 8, 386 ¶ 10. Each Area Office in turn apportions its share of funds among local service unit programs in its area, with some funds assigned to programs directly operated by the agency on behalf of non-contracting Tribes and other funds assigned to programs administered by Tribes through self-determination contracts. J.A. 215-216 ¶ 10; J.A. 385-386 ¶ 8. Programs ordinarily are funded on a recurring annual basis, with both contracted and non-contracted programs generally allocated the same amount of funding as in the previous fiscal year, plus a proportionate share of any overall increases in program funding. J.A. 215-216 ¶ 10; J.A. 385-386 ¶ 8; see 25 U.S.C. 450j-1(b)(2) (prohibiting reduction in contract funding in subsequent years except pursuant to, *inter alia*, reduction in appropriations for the program); 25 U.S.C. 1680a (requiring IHS to provide funds to contracting Tribes for "cost-of-living increases" and "other expenses relating to the provision of health services" on "the same basis as such funds are provided to programs and services operated directly").

The Headquarters Office and the Area Offices retain some funds to pay for administrative support for programs. J.A.

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[2] IHS also receives a separate lump-sum appropriation for "Indian Health Facilities," which provides funds for construction and maintenance of health care and sanitation facilities. See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-134, Tit. II, 110 Stat. 1321-190. Those funds are not at issue in this case.

385-386 ¶¶ 8, 10. Those administrative funds fall into two categories. First, a portion of the funds, referred to as "residual" funds, pays for inherent federal functions that are not available for contracting because they must be carried out by the agency—*i.e.*, those funds necessary for IHS to conduct its essential functions as a federal agency even if all IHS health service programs were administered by Tribes under self-determination contracts. J.A. 217 ¶ 14, 385-386 ¶¶ 8, 10; see 25 U.S.C. 458aaa(a)(4) ("The term 'inherent Federal functions' means those Federal functions which cannot legally be delegated to Indian tribes."). The remaining funds for administrative support are available for contracting by Tribes, with each Tribe assigned a "tribal share" of such funds. J.A. 218 ¶ 15, 385-386 ¶ 8; see 25 U.S.C. 458aaa(a)(8) ("'tribal share' means an Indian tribe's portion of all funds * * * that support secretarial programs" and "are not required * * * for performance of inherent Federal functions"). Whereas the tribal share of a contracting Tribe is distributed to the Tribe, the tribal share of a non-contracting Tribe is retained by the agency to fund administrative support for direct delivery of services to that Tribe's members by IHS. J.A. 218 ¶ 15.

The upshot of the IHS's allocation of funds is that, with the exception of residual funds retained by the agency to pay for inherent federal functions, the entire Indian Health Services appropriation is available for contracting by Tribes. In the relevant fiscal years, the agency allocated roughly 1.5% to 2.0% of the Indian Health Services appropriation to inherent federal functions, leaving all remaining sums available for contracting by Tribes. See J.A. 384 ¶ 4 (total appropriations); J.A. 525 (FY 1994 residual); J.A. 542 (FY 1995 residual); J.A. 562 (FY 1996 residual).

B. IHS's Funding For Contract Support Costs

1. In each of the relevant fiscal years, the Appropriations Committees in Congress identified a specific amount of the

Indian Health Service appropriation that was expected to be allocated to CSCs. The committee reports allocate the lump-sum appropriation among 14 discrete categories, one of which is "Contract Support Costs." J.A. 214 ¶ 4, 384 ¶ 5.[3] Those same categories are used throughout IHS's budget and appropriations process: the agency apportions its funding among those categories in its annual Justification of Appropriations; the President allocates IHS's budget among the same categories when submitting the annual federal budget to Congress; and the Appropriations Committees earmark amounts in their reports for each category. J.A. 384-385 ¶ 6. The committee reports for the relevant fiscal years earmarked between $136.7 million (FY 1994) and $160.7 million (FY 1997) for the category of "Contract Support Costs."[4]

In addition, Congress specified in each year's appropriations act that $7.5 million was to pay for CSCs associated with new or expanded contracts. In particular, the appropriation for Indian Health Services provided in each year that, "of the funds provided, $7,500,000 shall remain available until expended, for the Indian Self-Determination [ISD] Fund, which shall be available for the transitional costs of initial or expanded tribal [self-determination] contracts."[5]

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[3] The remaining categories are: Hospitals and Clinics, Mental Health, Alcohol and Substance Abuse, Public Health Nursing, Health Education, Communication Health Representatives, Immunization, Urban Health, Indian Health Professions, Tribal Management, Direct Operations, and Self-Governance. J.A. 384 ¶ 5.

[4] See H.R. Rep. No. 158, 103d Cong., 1st Sess. 100, 104 (1993) ($136,686,000 for FY 1994); H.R. Rep. No. 551, 103d Cong., 2d Sess. 103 (1994) ($145,738,000 for FY 1995); H.R. Rep. No. 173, 104th Cong., 1st Sess. 97 (1995) ($153,040,000 for FY 1996); S. Rep. No. 319, 104th Cong., 2d Sess. 90 (1996) ($160,660,000 for FY 1997).

[5] Department of the Interior and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-138, Tit. II, 107 Stat. 1408; Department of the Interior and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-

The ISD Fund referred to in the appropriations acts was established by IHS in 1988 to pay for CSCs associated with new or expanded programs. See *GAO Report* 82.[6]

2. In each of the relevant fiscal years, IHS in turn funded CSCs in an amount equaling the full amount earmarked in the committee reports, with the $7.5 million appropriation for the ISD Fund allocated to pay CSCs for new or expanded programs and the remaining sums allocated to contracts for ongoing programs. J.A. 218-219 ¶ 17, 302 ¶ 24. While the agency distributed all of those funds to Tribes, the amounts were insufficient to permit full funding of CSCs. See generally *GAO Report* 82. In 1995 and 1996, for example, requests for CSCs for new or expanded contracts exceeded the $7.5 million ISD Fund appropriation by $21.9 million and $34.6 million, respectively. J.A. 393 ¶ 42. And in 1996 and 1997, the overall shortfall in CSC funding, including both new or expanded contracts and ongoing contracts, was approximately $43 million and $82 million, respectively. J.A. 53, 215 ¶ 8.

IHS allocated its CSC funds in those years in accordance with guidelines that had been established in 1992, in consultation with Tribes, in anticipation of funding shortfalls for CSCs. Indian Self-Determination Memorandum 92-2, Contract Support Cost Policy (Feb. 27, 1992) (J.A. 6-19); see J.A. 220-221 ¶¶ 23-24. Those guidelines, consistent with the general limitation on the Secretary's obligation to provide funding in 25 U.S.C. 450j-1(b), stated that funding "for contract support costs [was] subject to the availability of funds made available for this purpose." J.A. 7.

332, Tit. II, 108 Stat. 2499, 2528; Department of the Interior and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-134, Tit. II, 110 Stat. 1321-189; Department of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, Tit. II, 110 Stat. 3009-212, 3009-213.

[6] BIA created a parallel ISD Fund in 1995. See *GAO Report* 80.

With respect to new or expanded contracts, the agency placed CSC requests in a queue based on the date of the request (the ISD queue), and awarded full-funding of those CSCs on a first-come, first-served basis each year until the $7.5 million appropriation for the ISD Fund was exhausted. J.A. 10-11, 220 ¶ 23. Unfunded requests remained on the queue in subsequent years. Once a tribe's request reached the top of the queue and was funded, the funds became part of the Tribe's recurring CSC funding base in subsequent years. J.A. 220 ¶ 23. With respect to ongoing contracts, tribes received the same amount of CSC funding as in the previous year plus a proportionate share of any general increase in overall CSC funding. J.A. 15. In 1996, after consultation with Tribes, IHS revised the guidelines but did not alter the basic distribution methodology. Indian Health Service Circular 96-04, Contract Support Costs (April 1, 1996) (J.A. 20-37).

3. In the appropriations act for fiscal year 1999, Congress enacted a provision barring IHS from spending any amounts on CSCs for fiscal years 1994 to 1998 above the sums that had been earmarked in appropriations laws or appropriations committee reports for those years. That provision directs:

> Notwithstanding any other provision of law, the amounts appropriated to or earmarked in committee reports for the Bureau of Indian Affairs and the Indian Health Service * * * for payments to tribes and tribal organizations for contract support costs associated with self-determination or self-governance contracts * * * are the total amounts available for fiscal years 1994 through 1998 for such purposes * * * .

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-227, § 314, 112 Stat.

2681-288 (Section 314).[7] Since the appropriations act for fiscal year 1998, moreover, Congress has imposed an explicit, "not to exceed" cap funding by IHS for overall CSCs. See, *e.g.*, Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1583; see *Thompson* Pet. 5 n.3 (citing subsequent appropriations acts).[8]

III. The Current Controversy

A. Factual Background

The Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservation (collectively, the Tribes) entered into self-governance compacts with IHS in 1993 and 1994, respectively. J.A. 72-103 (Shoshone-Paiute); J.A. 172-200 (Cherokee Nation). Those compacts and the associated annual funding agreements (AFAs) provide, consistent with 25 U.S.C. 450j-1(b) and the ISDA model agreement, that the provision of funds is subject to the availability of appropriations. See J.A. 78, 127, 145, 176, 239. The AFAs also specifically contemplate adjustments in funding based on "Congressional action in appropriation Acts or other laws affecting availability of funds." J.A. 121-122; see J.A. 190, 237, 239, 256-257, 269.

B. Proceedings Below

These consolidated cases concern the provision of CSC funds to the Cherokee Nation in fiscal years 1994 to 1997 and to the Shoshone-Paiute in fiscal years 1996 and 1997. In particular, *Cherokee* (No. 02-1472) involves claims by the

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[7] In the same year, Congress enacted a one-year moratorium barring the Secretary from entering into new ISDA contracts. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 328, 112 Stat. 2681-291.

[8] A parallel cap on CSC funding had been in BIA's appropriation since 1994. *GAO Report* 80.

Shoshone-Paiute for 1996 and 1997 and by the Cherokee Nation for 1997, and *Thompson* (No. 03-853) involves claims by the Cherokee Nation for 1994 to 1996. Both Tribes contracted in those years to undertake new or expanded programs for which they did not receive CSC funding because IHS used the $7.5 million ISD Fund appropriation to fund requests ahead of the Tribes' in the ISD queue. Also, the Cherokee Nation raises claims concerning CSC funding for ongoing contracts.[9]

1. Proceedings in Cherokee Nation, *No. 02-1472*

a. On March 5, 1999, the Tribes brought an action in the United States District Court for the Eastern District of Oklahoma, claiming an entitlement to full CSC funding under the ISDA and their contracts. See 25 U.S.C. 450m-1(a). The district court granted summary judgment in favor of the government. Pet. App. 24a-50a. The court held that IHS had insufficient appropriations available in the relevant fiscal years to permit full funding of CSCs, and that reprogramming funds to pay for CSCs would have resulted in a reduction of services to other tribes within the meaning of 25 U.S.C. 450j-1(b). Pet. App. 46a.

b. The Tenth Circuit affirmed. Pet. App. 1a-23a. The court rejected the Tribes' argument that they had a vested entitlement to full CSC funding immediately upon enactment of the annual lump-sum appropriation for Indian Health Services. *Id.* at 15a-16a. The court instead held that, under 25 U.S.C. 450j-1(b), the Secretary was not required to provide full funding because doing so "would have necessitated a reduction in funding for other tribal programs." Pet. App. 15a.

The court further explained that IHS could adhere to the level of CSC funding earmarked in the committee reports

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[9] The Cherokee Nation's claims for ongoing contracts are limited to 1995 and 1997 because it received full CSC funding for ongoing contracts in 1994 and 1996. See *Thompson* Pet. App. 79a-80a.

"as an exercise of the limited discretion inevitably vested in it" in allocating funds within its overall budget. Pet. App. 16a. With respect to the $7.5 million appropriation for the ISD Fund, the court agreed with the Ninth Circuit that Congress thereby "limit[ed] the amount available for new or expended CSCs." *Id.* at 20a (citing *Shoshone-Bannock Tribes* v. *Thompson*, 279 F.3d 660 (9th Cir. 2002)). Finally, the court explained that its conclusions were reinforced by Section 314 of the 1999 appropriations act (see p. 13, *supra*), which had established that "no more funds would be available to pay CSCs" for fiscal years 1994-1998 above the $7.5 million appropriation for CSCs for new or expanded programs and the total budget for CSCs earmarked in the Committee Reports. Pet. App. 21a.

2. Proceedings in* Thompson, *No. 03-853

a. On September 27, 1996, the Cherokee Nation submitted a claim to IHS under the Contract Disputes Act, 41 U.S.C. 601 *et seq.*, alleging underpayment of CSCs in fiscal years 1994 to 1996. The contracting officer denied the claim, ruling that Congress had not provided IHS sufficient funds for CSCs and that "IHS is not required to meet [the Cherokee Nation's] total need for indirect costs where such action would reduce the funds otherwise available to other tribes." Pet. App. 76a-77a.

b. On appeal, the Interior Board of Contract Appeals (IBCA) granted summary judgment in favor of the Cherokee Nation. Pet. App. 50a-73a. The IBCA held that, although contract funding was subject to the availability of appropriations, the overall lump-sum appropriation for Indian Health Services was sufficient to fund CSCs for the Cherokee Nation. *Id.* at 67a-68a. The IBCA also ruled that Section 314 of the 1999 appropriations act did not "extinguish" the Cherokee Nation's entitlement to full funding of CSCs. *Id.* at 69a-71a. Finally, on reconsideration, the IBCA rejected the Secretary's reliance on Section 450j-1(b)'s condition that

he was not required to reduce funding for programs serving a Tribe to make funds available to another Tribe. *Id.* at 43a-49a. In the IBCA's view, the Secretary was obligated to pay CSC's "first" from the lump-sum appropriation and he thus lacked authority to withhold CSC funding to pay for various health-service programs, many of which the IBCA believed to be "discretionary." *Id.* at 48a.

c. The Federal Circuit affirmed. Pet. App. 1a-35a. With respect to ongoing contracts, the court held that the Secretary had a duty to pay full CSCs and that there were "available funds" within the annual lump-sum appropriation. *Id.* at 20a-22a. With respect to new or expanded contracts, the court disagreed with the Ninth and Tenth Circuits and held that the $7.5 million appropriation specified for the ISD Fund was not a ceiling. *Id.* at 22a-26a. The court also rejected the Secretary's reliance on Section 314, interpreting that provision as "merely prohibiting the *future* obligation of unspent appropriated funds" left over for fiscal years 1994 through 1998, not to limit the amounts the Secretary could pay *during* those fiscal years. *Id.* at 29a.

Next, the court held that the Secretary's obligation to pay full CSCs was not relieved by Section 450j-1(b)'s prescription that funding for programs serving a Tribe need not be reduced to make funds available to another Tribe. Pet. App. 31a-34a. In the court's view, there were "substantial funds" that the Secretary could have used to pay additional CSCs to the Cherokee Nation without reducing funding for programs serving other Tribes. *Id.* at 31a. The court pointed in particular to the residual funds retained by IHS for inherent federal functions, *i.e.*, funds necessary for IHS to exist as a federal agency at all. The court reasoned that those funds were not for programs serving another Tribe and so could be reprogrammed to pay CSCs. *Id.* at 32a-33a. In addition, the court believed that the Secretary should have used IHS's unobligated year-end balances of between $1.2 million and

$6.8 million to pay the Cherokee Nation full CSCs. Pet. App. 33a.

SUMMARY OF ARGUMENT

I. The ISDA prescribes that, "[n]otwithstanding any other provision," the "provision of funds under [the Act] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." 25 U.S.C. 450j-1(b). That provision recognizes that IHS must apportion scarce resources for Indian health services programs among numerous competing demands by or on behalf of Tribes, and that the ISDA does not give any single Tribe an entitlement to full funding at the expense of the needs of all other Tribes.

A. There is no merit to the Tribes' argument that each individual Tribe gained an automatic entitlement to full funding of its CSCs because the amount of the lump sum appropriation in a given fiscal year was sufficient to pay any one Tribe's CSCs. That approach treats each Tribe's claim to ISDA funds as entirely unaffected by the needs of other Tribes, which is inconsistent with the distinctive, government-to-government nature of ISDA contracts.

In the setting of a standard procurement contract, it may be that in certain circumstances a contractor is not charged with knowledge of competing demands on the funds or of an agency's discretionary decision to allocate funds elsewhere. The ISDA makes clear, however, that self-determination contracts are not procurement contracts. Whereas a procurement contractor supplies services *to* the government, a Tribe assumes the delivery of services *as* the government. Like an agency, the Tribe is allocated a portion of the total funds made available by Congress, and the Tribe has no obligation to deliver a specific quantity of services or to continue services in excess of the amount of funds received. Each Tribe is fully aware that IHS must allocate limited

funding among numerous local programs, and that its own ISDA contract therefore is not an independent federal procurement but rather the product of the necessary allocation of funds among Tribes.

B. The ISDA embodies that understanding in its "reduction clause," which provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." 25 U.S.C. 450j-1(b). IHS allocates its entire lump sum appropriation among three general categories of funding: (i) direct delivery of services; (ii) administrative support functions that Tribes may contract to assume; and (iii) inherent federal functions that must be performed by the agency itself.

Contrary to the view of the Tribes and of the Federal Circuit below, the Secretary was not required to reprogram funds for the agency's inherent federal functions to pay for the Tribes' CSCs. A basic principle of government contracting is that certain agency functions must be performed by the agency and thus are not subject to contracting. The ISDA makes clear that the agency was not required to reprogram those funds—and potentially contract itself out of existence—to pay the full CSCs of contracting Tribes. For instance, the ISDA only allows for assumption by Tribes of administrative functions "that are otherwise contractable," 25 U.S.C. 450f(a)(1), and specifically assumes that certain functions "cannot lawfully be carried out by the contractor," 25 U.S.C. 450f(a)(2)(E). And when Congress codified the permanent self-governance provisions in the ISDA, it made explicit that the Secretary may not contract "with respect to functions that are inherently Federal." 25 U.S.C. 458cc(k). The Tribes' agreements in this case accept that basic understanding.

C. The Secretary's funding determinations with respect to CSCs were also supported by the ISDA's "availability" clause, which states that "the provision of funds" is "subject

to the availability of appropriations." 25 U.S.C. 450j-1(b). Contrary to the Tribes' position, appropriations are not automatically "available" to pay a Tribe's full CSCs simply because the total amount of the lump sum appropriation exceeds that individual Tribe's CSCs. The availability of funds for any one Tribe must be considered, not in isolation, but in the context of the need to allocate funds among numerous tribal programs for the delivery of health care services to Tribes and their members.

The terms of the availability clause reflect that understanding. The clause refers specifically to the "provision of funds" by the Secretary, and it is a grant of authority to adjust the level of funding for a contract in response to the amount of appropriations. Accordingly, the fact that each Tribe's CSCs were less than the overall lump sum was not itself sufficient to render appropriations "available" to pay full CSCs. The legislative history confirms that Congress added the availability clause to the ISDA in order to ensure that the Secretary was not required to pay for CSCs ahead of all competing priorities. Congress also made clear its intention in that respect by requiring the Secretary to submit an annual report identifying the shortfall in CSC funds, 25 U.S.C. 450j-1(c), a requirement that would have been unnecessary if Congress had intended for the Secretary to pay full CSCs from the lump sum appropriation ahead of any other demands.

II. Section 314 of the 1999 appropriations act independently establishes that the Secretary was not required to distribute additional CSC funds in the relevant fiscal years. That provision states that, "[n]otwithstanding any other provision of law," the "amounts appropriated to or earmarked in committee reports" for "contract support costs" are the "total amounts available for fiscal years 1994 through 1998 for such purposes." 112 Stat. 2681-288. Because the Secretary, in each of those years, distributed CSC funds in

amounts equaling the amounts "earmarked in committee reports," Section 314 establishes that the amounts distributed by the Secretary are the "total amounts available" for those years. Section 314 thus confirms that the Secretary was not required to make additional CSC funding available in those years.

The Tribes interpret Section 314 as intended solely to prohibit the expenditure of any leftover balances from fiscal years 1994 to 1998 to pay for CSCs for those years. But Congress made no reference to leftover balances in the text and gave no suggestion that Section 314 was to have that restricted effect. Moreover, even though the authority to use leftover balances expires after five years, Congress has reenacted the provisions of Section 314 in each subsequent year and has continued to apply the provisions to fiscal years beginning with 1994. If Congress's sole intention were to limit the authority spend leftover balances, there would have been no need to apply the provisions of Section 314 to fiscal years for which the five-year period has elapsed.

There is no merit to the Tribe's argument that according Section 314 its plain meaning would raise serious constitutional concerns. Section 314 could raise no issue under *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872), because it changed pre-existing law by clarifying the total amounts available for CSCs in the specified years. Congress clearly has the power to enact legislation that affects the disposition of pending cases. Section 314 is in the nature of a retroactive ratification by Congress of agency action. This Court has upheld such ratifications by Congress and has further held that they apply in pending cases. *E.g.*, *United States* v. *Heinszen & Co.*, 206 U.S. 370 (1907). Here, even if the Secretary initially erred in funding CSCs at the levels earmarked in the committee reports, Congress in Section 314 subsequently ratified the Secretary's actions.

ARGUMENT

I. THE SECRETARY WAS NOT REQUIRED BY THE INDIAN SELF-DETERMINATION ACT TO PAY THE TRIBES' FULL CONTRACT SUPPORT COSTS AHEAD OF ALL COMPETING PRIORITIES AND AT THE EXPENSE OF PROGRAMS SERVING OTHER TRIBES

Congress specified in the terms of the ISDA that, "[n]otwithstanding any other provision in [the ISDA],"

> the provision of funds under [the ISDA] is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under [the ISDA].

25 U.S.C. 450j-1(b). That provision, by its terms, governs over "any other provision" in the ISDA, and it establishes that the Secretary was not obligated to pay the Tribes' full CSCs.

The Tribes divide the critical sentence in Section 450j-1(b) into two distinct clauses, "availability" and "reduction," and urge an unduly cramped construction of each. The threshold flaw in that approach is that it considers each clause in a vacuum. The clauses were enacted together, and they are mutually reinforcing as parts of the same sentence and in the context of the ISDA as a whole. Together, they embody a recognition by Congress that the agency is charged with apportioning scarce resources for Indian programs among competing demands by or on behalf of numerous Tribes, and that the ISDA was not designed to prevent the agency from fulfilling that traditional and critical function.

A. Tribal Contractors Step Into The Shoes Of A Federal Agency Under The ISDA And Therefore Are Subject To The Same Funding Constraints

The core of the Tribes' argument (Br. 25-32) is that enactment of a general lump sum appropriation automatically rendered sufficient funds available to pay each individual Tribe's full CSCs, and that the Tribes in this case, upon enactment of each year's lump sum appropriation, gained an immediate entitlement to payment of those CSCs ahead of all competing demands on the funds. That is so, in the Tribes' view, even though the competing demands are by or on behalf of *other* Tribes that would have comparable claims to the same appropriation. This divide-and-conquer approach ignores the Secretary's fundamental obligation to ensure that the total amount of funds allocated to individual Tribes, together with the funds necessary to support IHS's inherent federal functions, do not exceed the annual lump sum appropriation. It also ignores the necessary consequences in this setting of the unique, government- to-government nature of agreements under the ISDA.

1. The ISDA manifests throughout that Tribes electing to assume administration of federal services become partners in administering a federal program, not standard arms-length procurement contractors. See 25 U.S.C. 450b(f) (stating that "no [self-determination] contract * * * shall be construed to be a procurement contract"); 25 U.S.C. 450j(a) (exempting self-determination contracts from federal contracting laws and regulations). The Tribes are therefore wrong to rely (Br. 25-32) on decisions holding in the procurement context that, if the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment even if the agency has allocated the funds to another purpose or assumes other obligations that exhaust the funds. See *Blackhawk Heating & Plumbing Co.* v. *United States*, 622 F.2d 539, 552 n.9 (Ct. Cl. 1980);

2 GAO, *Principles of Federal Appropriations Law* (*GAO Redbook*) 6-17 to 6-18 (2d ed. 1992). A procurement contract generally is the product of arms-length bargaining on the quantity of services to be supplied and the price to be paid. The risk of over-obligation may be found to fall on the agency in that setting because the agency has discretionary control over its funds; and the contractor is not charged with knowledge of a discretionary decision by the agency to allocate the funds elsewhere. See *id.* at 6-17.

Whatever force that approach may have in the context of an arms-length agreement between a procurement contractor and an agency, it is inapposite when a Tribe essentially elects to *become* an agency pursuant to the ISDA. Unlike procurement contractors, each Tribe enjoys a unilateral entitlement under the ISDA to assume administration of federal services for its members. A Tribe does not thereby undertake to supply a fixed quantity of services in exchange for a negotiated price. Instead, a Tribe, just like a federal agency, is allocated its portion of the total amount of funds made available by Congress, and the Tribe is under no obligation to deliver services "in excess of the amount of funds awarded." 25 U.S.C. 450*l*(c) (Model agreement § 1(b)(5)); see 25 U.S.C. 458aaa-7(k). The Tribes in this case received payments of recurring annual funds to administer federal programs within their respective service areas, see J.A. 78-79, 176-177, and they understood that they had no obligation to provide services in excess of the amount of funds received, see J.A. 79-80.

Significantly, moreover, under the ISDA, the condition that the provision of funds is subject to availability of appropriations is not simply a provision in a contract. Compare *Blackhawk*, 622 F.2d at 542. That limitation is set forth in the Act itself. It therefore establishes an overriding statutory condition on funding for IHS's programs to which all

Tribes are mutually subject, and which in turn is reflected in their agreements with IHS.

Once the lump sum appropriation for a given fiscal year is enacted, the overall IHS budget is allocated among numerous local service units to support the delivery of health care services for all Tribes whose members are beneficiaries of IHS programs. Just as all Tribes are fully aware of the overriding statutory limitation that funding is subject to the availability of appropriations, all Tribes also are fully aware that there is a threshold allocation of funds, and that they all are, in this respect, similarly situated. Each Tribe therefore is fairly charged with knowing that its own ISDA contract is not an independent procurement for a distant federal agency, but rather the product of the overall allocation mechanism among Tribes.

The ISDA reinforces in additional ways the degree to which a self-determination Tribe steps into the shoes of a federal agency in the Tribe's own service area. For instance, the Act deems participating Tribes to be part of the Department of Health and Human Services for purposes of the Federal Tort Claims Act. See 25 U.S.C. 450f(d). Tribes also are deemed to be "an executive agency and part of the Indian Health Service" for purposes of gaining access to federal sources of supply. 25 U.S.C. 450j(k). In short, whereas a procurement contractor supplies services *to* the government, a Tribe provides services *as* the government.

2. The foregoing understanding of ISDA contracts substantially informs the statutory condition that "the provision of funds * * * is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects or activities serving a tribe to make funds available to another tribe." 25 U.S.C. 450j-1(b). That provision reflects, consistent with the overall thrust of the ISDA, that a contracting Tribe steps into the shoes of the federal agency in the Tribe's service area and thus is subject

to the same funding constraints that the agency would confront if it continued to administer the program directly at that location.

That is particularly the case in view of the acute funding constraints on IHS programs. See *A Neglected Obligation*, Wash. Post, Aug. 30, 2004, at A22 ("The Indian Health Service, primary health care provider for more than 1.6 million members of federally recognized tribes, is so underfunded that it spends only $1,914 per patient per year, about half of what the government spends on prisoners ($3,803) and far below what is spent on the average American ($5,065)."). Congress recognized that the "unmet health needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States." 25 U.S.C. 1601(d). IHS's annual appropriation falls far short of the funds necessary to address the health care needs of Indian tribes and their members. See Jennie R. Joe, *The Rationing of Healthcare and Health Disparity for the American Indians/Alaska Natives* 528, 530 n.2 *in Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care* (Brian D. Smedley et al. eds., 2002) (estimating that IHS would need an annual appropriation of $15 billion, as compared with current appropriation of approximately $2.5 billion, to meet the health care needs of all American Indians and Alaska Natives); J.A. 78 (Shoshone-Paiute Compact, stating that "the Indian Health Services budget is inadequate to fully meet the special responsibilities and legal obligations of the United States to assure the highest possible health status for American Indians"). It would be incongruous in that setting to conclude that each Tribe enjoyed an immediate entitlement to full funding of CSCs upon enactment of the lump-sum appropriation, regardless of the competing demands of other Tribes for actual delivery of health services.

B. The Secretary Was Not Required To Pay The Tribes' Full CSCs Because To Do So Would Have Required Reducing Funds For Programs And Activities Serving Other Tribes

Section 450j-1(b)'s "reduction clause" provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe." 25 U.S.C. 450j-1(b); see 25 U.S.C. 450j(i) ("Nothing in this part shall be construed to limit or reduce in any way the funding for any program, project, or activity serving a tribe under this or other applicable law."). That provision entitled the Secretary to limit the payment of CSCs in this case.[10]

1. IHS allocates its entire Indian Health Services lump-sum appropriation either to programs and activities serving Tribes or to inherent federal functions

IHS ultimately apportions its entire lump-sum appropriation for Indian Health Services into one of three broad

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[10] The Tribes assert as a threshold matter (Br. 42-43), for the first time in this litigation, that the Secretary has "waived" any reliance on the reduction clause because the Secretary should have invoked the clause as a basis for declining to contract. That is incorrect. The reduction clause —like the availability clause to which it is appended—applies in the context of a completed contract and an enacted appropriation, and gives the Secretary authority to withhold the provision of funds under the contract if doing so would require reducing funds for activities serving other tribes. A separate provision of the ISDA specifies five discrete grounds for declining to award a requested contract. 25 U.S.C. 450f(a)(2)(A)-(E). The Tribes bottom their waiver argument in Section 450f(a)(2)(D), which applies when "the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under section 450j-1(a)." That provision pertains to whether the level of full funding proposed by a Tribe is accurate, whereas the reduction clause addresses whether providing funds under the contract would require reducing funding for programs or activities serving other Tribes.

categories of funds: (i) direct program funding for delivery of services at local service units; (ii) contractable funds for administrative support in the Headquarters Office and Area Offices that are allocated among tribes as "tribal shares"; and (iii) funds for inherent federal functions that must be performed by the agency and thus cannot be contracted to a Tribe. See pp. 8-10, *supra*. The funding for those three categories of activities is on a zero-sum basis. Any increase in the amounts paid to Tribes for CSCs necessarily would have required reducing funds in one of those categories.

The Tribes do not suggest that IHS was required to reduce direct program funding at the service unit level in order to make funds available for CSCs. Such funds, by definition, constitute "funding for programs, projects, or activities serving a tribe," and therefore need not be reduced to make funds available to a particular contracting Tribe. 25 U.S.C. 450j-1(b); see J.A. 98 (Shoshone-Paiute Compact) ("Nothing in this Compact or associated Annual Funding Agreement shall be construed to limit or reduce in any way the service[s], contracts or funds that any Indian Tribe or tribal organization is eligible to receive.").

The Tribes contend (Br. 45), however, that while the Secretary was not required to reprogram "funding for programs," he was required to "reprogram *other* agency funding." Insofar as the Tribes mean to suggest that the Secretary was required to divert funds for the agency's contractable *administrative* functions, that suggestion is incorrect. The terms of the reduction clause encompass not just "programs" but also "activities," 25 U.S.C. 450j-1(b), and the ISDA elsewhere describes administrative support as a contractable "activity." 25 U.S.C. 450f(a)(1) (explaining that "administrative activities supportive of, but not included as part of, the service delivery programs that are otherwise contractable" may be included in a self-determination contract). Accordingly, contractable administrative funding, no

less than direct program funding, is a program or activity serving a Tribe. The Secretary therefore was not required to reduce such funding in order to make funds available to pay the Tribes' full CSCs.

The only remaining candidate as a source of funds to pay the additional CSCs that the Tribes seek in this case was the amount needed to fund IHS's inherent federal functions. As we explain in the next section, the Secretary was not required to divert to the two tribal plaintiffs in this case, for their CSCs, the funds needed for IHS to exist as an agency and serve *all* Tribes.

2. The Secretary was not required to make funds for inherent federal functions available to pay CSCs

The Tribes argue (Br. 44, 48), in accordance with the Federal Circuit's decision below in *Thompson*, that the Secretary was obligated to reprogram funds for inherent federal functions to pay their CSCs. That argument is manifestly incorrect. Funds for inherent federal functions, *i.e.*, funds for there even to *be* an IHS, were not available for contracting to Tribes.

a. Even if all IHS programs and activities were assumed by Tribes, there would remain a core set of residual functions that IHS itself would be required to perform in order to continue functioning as a federal agency. J.A. 299 ¶ 13, 386 ¶ 9. Examples of such inherent federal functions include: determination of Secretarial policy including promulgation of regulations and legislative initiatives; formulation of the President's budget; conduct of administrative hearings and appeals; direction and control of federal workforce (including hiring and promotion); management of government property; and control of treasury accounts. See Final Report of

Indian Health Service/Tribal Residual Workgroup (Feb. 1995).[11]

There is nothing novel in IHS's determination that its core agency functions could not be contracted to Tribes. See OMB, *Policy Letter on Inherently Governmental Functions*, 57 Fed. Reg. 45,096 (1992). A contrary conclusion would be untenable. In 1996, for example, IHS confronted a cumulative shortfall in funding for CSCs of $43 million. J.A. 215 ¶ 8. The same year, IHS allocated a total of $36 million of its lump-sum appropriation to inherent federal functions. J.A. 562. If, as the Federal Circuit believed, the Secretary was obligated to reprogram funds for inherent federal functions to pay the underfunded amount of CSCs, the agency was required to contract itself out of existence. Congress could not have intended that result. Congress did not compel the agency to shut its doors and cease operations—and thereby to render itself unable to contract with *any* Tribes—in order to enable the payment of full CSCs to some Tribes.[12]

b. The understanding that the agency's inherent federal functions cannot be assumed by Tribes runs throughout the ISDA. The statute assumes that certain activities proposed for inclusion in a self-determination contract are "beyond the

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[11] The Residual Workgroup, which included both tribal and agency representatives, was established by IHS in September 1994, to develop principles for identifying the resources the agency must retain to perform its inherent federal functions. The Residual Workgroup completed its activities in January 1995, and issued a final report in February 1995. That report was distributed to all Tribes.

[12] See, *e.g.*, 25 U.S.C. 1661(a) ("[T]here is established within the Public Health Service of the Department of Health and Human Services the Indian Health Service."); 25 U.S.C. 1661(b) ("The Indian Health Service shall be an agency within the Public Health Service of the Department of Health and Human Services."); 25 U.S.C. 1661(c) ("The Secretary shall carry out through the Director of the Indian Health Service * * * all health programs under which health care is provided to Indians based upon their status as Indians which are administered by the Secretary.").

scope of [contractable] programs" because they encompass "activities that cannot lawfully be carried out by the contractor." 25 U.S.C. 450f(a)(2)(E); see 25 U.S.C. 458aaa-6(c)(1)(A)(ii) (IHS self-governance provisions) (allowing Secretary to decline a request to contract if program or activity "that is the subject of the final offer is an inherent Federal function that cannot legally be delegated to an Indian tribe"). To the same effect, Congress was careful to specify, when permitting Tribes to assume "administrative functions," that the authority encompassed only "administrative activities * * * *that are otherwise contractable.*" 25 U.S.C. 450f(a)(1) (emphasis added); accord 25 U.S.C. 450j-1(a)(1) (providing for funding of "supportive administrative functions that are otherwise contractable"). The Model Agreement reflects the same understanding. 25 U.S.C. 450*l*(c) (Model agreement § 1(a)(2), providing for "transfer" to a Tribe of "the following related functions, services, activities, and programs (or portions thereof) that are otherwise contractable").

Of particular significance, Congress explicitly recognized the role of "inherent federal functions" when it codified the self-governance provisions for BIA in 1994. In the provision that authorizes the Secretary of the Interior to enter into annual funding agreements, Congress clarified that, "[n]othing in this section is intended or shall be construed to expand or alter existing statutory authorities in the Secretary so as to authorize the Secretary to enter into any agreement * * * with respect to functions that are *inherently Federal.*" 25 U.S.C. 458cc(k) (emphasis added). By recognizing explicitly that any authorization to contract for inherent federal functions would "expand or alter existing statutory authorit[y] in the Secretary," Congress made plain that at the time of those amendments—which was before most of the contracts at issue in this case were executed—it was well understood that inherent federal functions were not subject to contracting. See 25 C.F.R. 1000.94 (BIA self-governance

regulations stating that "residual functions are those functions that only BIA employees could perform if all Tribes were to assume responsibilities for all BIA programs that the Act permits"); 25 C.F.R. 1000.129(a) (explaining that 25 U.S.C. 458cc(k) "excludes from the program * * * Inherently Federal functions").

It follows that IHS properly retained a portion (approximately two percent) of its lump sum appropriation for those inherent federal functions that must be funded for there to *be* an IHS having capacity to contract with Tribes. The legislative history of the BIA self-governance provisions cements that understanding. The House Report explained that "residual funds which are necessary to carry out those limited functions which may be performed only by a Federal official" may "be held back by the Department in the negotiation of a self-governance agreement." H.R. Rep. No. 653, 103d Cong., 2d Sess. 11 (1994).

When Congress later enacted permanent self-governance provisions for IHS in 2000, it specifically included a definition of "inherent Federal functions" as "those Federal functions which cannot legally be delegated to Indian tribes." 25 U.S.C. 458aaa(a)(4). Congress also enacted a corollary definition of "Tribal share" as "an Indian tribe's portion of all funds and resources that support secretarial programs * * * that are not required by the Secretary for performance of inherent Federal functions." 25 U.S.C. 458aaa(a)(8). An individual Tribe's "tribal share" of administrative support funding thus expressly does *not* include funds necessary for inherent federal functions. The same is true for a Tribe's CSCs. The provisions enacted in 2000 broke no new ground, as the preceding discussion makes clear. To the contrary, the Committee Report states that the definition of inherent federal functions simply "states the obvious." S. Rep. No. 221, 106th Cong., 1st Sess. 5 (1999).

c. Not surprisingly, the Tribes' contracts in this case embrace the basic understanding that funds for inherent federal functions (or "residual" funds) are unavailable to the Tribes. For instance, the 1997 Annual Funding Agreement with the Cherokee Nation reflects the parties' recognition that "resources identified as residual" are "unavailable for tribal share distribution." J.A. 188. That agreement similarly states that the parties "understand that, should the residual amount be decreased," "additional funding [would be] made available." J .A. 199; accord J.A. 267 (1996 Cherokee Nation AFA) ("The parties further agree that some resources identified as residual, or otherwise unavailable for tribal share distribution, may become available for such distribution during FY 1996."); J.A. 275 (same) (parties "understand that, should the residual amount be decreased, this AFA shall be modified to include the Nation's share of additional funding made available by the decrease in residual"). The Shoshone-Paiute agreements are to the same effect.[13] The Tribes thereby acknowledged in the agreements with IHS what the ISDA already made clear: the Secretary was not required to take funds for inherent federal functions and pay them to individual Tribes, whether for CSCs or any other purpose.

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[13] See J.A. 115 (stating that "Area tribal share was determined using a * * * formula for all Area programs not allocated to the service unit level and not reserved as part of the Area residual amount"); J.A. 118 ("The funds provided under this Agreement have been negotiated using certain residual and categorical line item assumptions."); J.A. 140 ("The amount set forth herein shall be amended to reflect the parties' final agreement regarding the residual level in fiscal year 1997.").

3. The Secretary did not reduce CSC funding in order to pay for "contract administration" or "federal functions" in violation of Section 450j-1(b)

The Tribes argue (Br. 44-46) that the Secretary violated restrictions in 25 U.S.C. 450j-1(b)(1) and (3) by reducing funding for CSCs in order to pay for "contract administration" and "Federal functions." That argument lacks merit.

The relevant provisions state that the "amount of funds required by subsection (a) of this section"—the basic ISDA provision that specifies the funds to be transferred to Tribes —shall "not be reduced to make funding available for contract monitoring or administration by the Secretary" or "to pay for Federal functions." 25 U.S.C. 450j-1(b)(1) and (3). Those constraints by their terms pertain solely to the "amount of funds required by subsection (a)," *i.e.*, 25 U.S.C. 450j-1(a). And the "amount of funds required by subsection (a)" in turn includes only those "administrative functions that are *otherwise contractable*." *Ibid.* (emphasis added). Accordingly, the constraints in Section 450j-1(b)(1) and (3) could have no application to funds retained by the Secretary to pay for inherent federal functions: those funds are not "contractable."

The Tribes therefore err in arguing (Br. 48) that the Secretary paid for "Federal functions" in breach of Section 450j-1(b)(3) by funding *inherent* federal functions. Funds for inherent federal functions are not within the contractable funds to which Section 450j-1(b)(3) applies in the first place. The Tribes err for the same reason in their arguments (Br. 46, 48) concerning expenses for "contract monitoring" referred to in Section 450j-1(b)(1). Of course, the very existence of a self-determination program requires the Secretary to undertake *some* contract-related functions as part of his inherent federal functions. See 25 U.S.C. 450c(f) (requiring contracting Tribe to submit single-agency audit report to

Secretary); 25 U.S.C. 450f(a) (describing procedures for Secretary to enter into self-determination contract or issue declination determination); 25 U.S.C. 450j(b) (providing for Secretary to transfer funding to contracting Tribe); 25 U.S.C. 450m (providing for rescission of contract by Secretary based on maladministration of program by contracting Tribe). See generally OMB, *Policy Letter*, 57 Fed. Reg. at 45,103 (including among illustrative list of inherently federal functions "[a]pproval of any contractual documents," "[a]warding contracts," "[a]dministering contracts," and "[t]erminating contracts").

Section 450j-1(b) was not intended to strip IHS of the ability to perform those functions, which are critical to the existence and integrity of the very contracting process the Tribes have invoked. Paragraphs (1) and (3) of Section 450j-1(b) have the quite different purpose of "protecting and stabilizing the funds for * * * programs from inappropriate administrative reduction by Federal agencies," such as the use of "tribal contract funding to pay for Federal computer equipment acquisition." S. Rep. No. 274, *supra*, at 30. Those provisions serve to ensure, for example, that once the funds for inherent federal functions are set aside, the funds that *are* available to support health services and CSCs of contracting Tribes are not then reduced or diverted to pay for aspects of IHS's operations that are *not* inherent federal functions, such as costs incurred by IHS in its direct delivery of services to Tribes that have chosen not to contract with IHS. Expending funds needed for the agency to perform its inherent federal functions does not constitute an "inappropriate administrative reduction." *Ibid.* It is, rather, an essential measure to ensure the performance of those core functions necessary to implement both IHS's health programs *and* the ISDA. And apart from the 1.5%-2.0% of the Indian Health Services appropriation that IHS allocated to inherent federal functions, the agency left the entire re-

mainder of its functions available for contracting with Tribes that might choose to assume the administration of the programs. See p. 10, *supra*.

There thus is no merit to the Tribe's argument (Br. 44) that the Secretary inappropriately withheld contract funding to "enhance his own bureaucracy." Indeed, from 1993 to 2000, IHS Headquarters' staff was reduced by 57%, and IHS staff in the Area Offices was reduced by 55%. S. Rep. No. 221, *supra*, at 2. In the view of the House Appropriations Committee, "[w]e have reached a point at which we can no longer offset [contract support] costs to any great extent by continuing to downsize the Federal bureaucracies in BIA and IHS. To do so would be unfair to the many tribes who choose not to manage their own programs and rely on the BIA and the IHS for program management." H.R. Rep. No. 609, 105th Cong., 2d Sess. 125 (1998).

4. The Secretary was not required to pay for CSCs with the agency's nominal unobligated balances at the close of the fiscal year

In their search for some source of full funding for their CSCs for the years in issue, the Tribes finally contend in passing (Br. 48-49) that the Secretary should have paid for their CSCs with the nominal, unobligated balances remaining in the agency's accounts at the close of each fiscal year. That is incorrect. To begin with, the unobligated balances for fiscal years 1994 to 1996 ranged from $1.2 million to $6.8 million, J.A. 508, 511, 516; see *Thompson* Pet. App. 33a, and therefore were insufficient to make up the aggregate shortfall in funding for CSCs. See J.A. 393 ¶ 43 ($21.9 million shortfall in 1995 for new and expanded contracts); J.A. 215 ¶ 8 ($43 million shortfall in 1996 for all contracts). Accordingly, even if the Secretary had been required to pay for CSCs with those balances, there is no reason that those funds would have flowed exclusively—or even at all—to the

Tribes in this case as opposed to the many other Tribes who were not paid full CSCs.[14]

In any event, the Secretary had no obligation to pay for CSCs with the unobligated balances. Those nominal balances reflect the need for Executive officers to ensure from the outset of the fiscal year that they will avoid obligating funds in excess of appropriations in violation of the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(A). Agencies are required to have in place a system for administrative control of funds to prevent obligations in excess of appropriations, see 31 U.S.C. 1514(a)(1), and a necessary feature of the system is that it allow an agency to pinpoint the particular person responsible for any unlawful obligation, OMB Circular No. A-11, § 150.2 (2004). Part of IHS's method of administrative control under its programs is the allocation of the aggregate funding among local service units and Tribes at the *beginning* of the fiscal year, so that persons responsible for each portion will know where they stand and can plan accordingly. It is a routine feature of prudent planning under such a system that there will be minor balances in some of the accounts at the *end* of the fiscal years. The existence of these incidental balances at the close of the fiscal year does not mean that the allocation of funds among service units and Tribes at the beginning of the year was improper and must be "corrected" by recalculating contract and program amounts previously awarded and apportioning the minor

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[14] The Tribes erroneously rely (Br. 12) on balance figures reported in the President's Budget. IHS is required to report in the President's Budget "all unobligated balances available for obligations (appropriations, authority to borrow, contract authority, fund balances)." OMB Circular No. A-11, § 82.8 (2004). Those sums may include funds that could not be used for CSCs because they are earmarked by statute for particular purposes. The sums also include collections from Medicare, Medicaid, and private health insurance, which IHS is required to use for improvements to facilities and to provide additional health care services. See 42 U.S.C. 1395qq(c).

remaining balances among them. IHS has reasonably provided for a definite, not a rolling, method of funding.

Furthermore, the balances in IHS's accounts in the relevant years represented approximately 0.1% to 0.3% of the $1.7 billion appropriation. Those sums are used in subsequent years to liquidate obligations that had not been recorded by the close of the fiscal year but are properly chargeable to that year's accounts. See 31 U.S.C. 1551, 1552; J.A. 218 ¶ 16, 303 ¶ 27. There thus is no basis for holding that the Secretary was required to collect the balances at the close of the fiscal year and use them to pay for the shortfall in CSCs.

C. The ISDA's Availability Clause Contemplates More Than The Mere Availability Of A Lump-Sum Appropriation

As explained above, payment of full CSCs to the Tribes would have required the Secretary either to divert the funds needed to support inherent federal functions or to "reduce funding for programs, projects, or activities serving a tribe," 25 U.S.C. 450j-1(b). Because of those barriers to paying the full amount of the Tribes' CSCs, there is no need for the Court to consider the applicability, standing alone, of the "availability" clause in Section 450j-1(b). That statutory clause, however, and the implementing "availability" clauses in IHS's contracts with individual Tribes, independently support the Secretary's funding determinations.

1. The text and history of the availability clause and its context within the ISDA demonstrate that the Tribes' interpretation is incorrect

a. The Tribes argue that the ISDA's availability clause is satisfied as long as the total amount of the lump sum appropriation for IHS exceeds the amount that would be necessary to pay each Tribe's own CSCs. That cannot be correct.

The rule the Tribes propose, of course, would always be satisfied if each individual Tribe is considered in isolation, because the lump sum appropriation would dwarf any one Tribe's own share of the total. But the availability of funds under the ISDA must be considered in light of the fundamental reality that the lump sum appropriation is intended to be allocated among numerous local service units that furnish tribal services, either directly by IHS or by Tribes that have elected that option under the ISDA. The availability of funds for any one Tribe therefore must be considered in light of that intervening allocation.

A hypothetical example demonstrates the point: suppose Congress were to slash the lump sum appropriation for IHS in half. The obvious purpose and effect of such a cut would be that programs serving individual Tribes (either directly or by ISDA contract) would have to be cut in turn, along with their corresponding CSC amounts. Under the logic of the Tribe's position, however, because the lump sum appropriation would still exceed the amount needed for any one Tribe, the entire lump sum would still be "available" to every individual Tribe considered in isolation. Congress did not intend for its explicit—and constitutionally rooted (see U.S. Const. Art. I, § 9, Cl. 7)—reservation of control over the availability of funds through the appropriation process to be rendered ineffectual in this manner.

A federal agency that administers programs directly is constrained by the need to allocate limited funds among competing priorities. IHS operated under such constraints when it directly administered all health programs at numerous local service units. When a Tribe steps into the shoes of IHS at a particular location and assumes the administration of federal services at that location, the Tribe likewise assumes the constraints arising from the need to allocate funds among competing demands on an agency-wide basis. "Availability of appropriations" in the context of the ISDA and

implementing agreements is therefore not determined by the mere facial availability of a lump-sum appropriation for the type of program a particular Tribe wants to operate.

b. The point is reinforced by textual differences between the availability clause in the ISDA and the availability clauses relied on by the Tribes. Virtually every one of the 50 availability clauses described by the Tribes as a "common feature in the landscape of government contract law," Br. 34; see *Cherokee* Pet. App. 73a-87a (listing statutes), speaks in terms of subjecting the "authority" of a government officer to "enter into contracts" to the furnishing of appropriations by Congress.[15] The purpose of those provisions is to make clear that an agency lacks authority to obligate the government fisc unless Congress makes sufficient appropriations legally available.[16]

The availability clause in Section 450j-1(b) is not intended solely to impose that constraint. Indeed, another provision, which has been part of the ISDA since its enactment, see Pub. L. No. 93-638, § 106(c), 88 Stat. 2211, already serves

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[15] The sole exception is 12 U.S.C. 1715z-1(i)(1).

[16] The Anti-Deficiency Act generally bars a government officer from obligating the government to pay money in advance of, or in excess of, congressional appropriations. 31 U.S.C. 1341(a)(1); see 2 *GAO Redbook* 6-12 to 6-19. An exception to that constraint arises when Congress confers "contract authority" to bind the government without regard to appropriations. See *id.* at 6-50 to 6-53; see also *Train* v. *New York*, 420 U.S. 35, 39 n.2 (1975). The basic authority of all agencies to enter into contracts is not "contract authority," because that basic authority is contingent on the availability of appropriated funds. See 2 *GAO Redbook* 6-50 to 6-51. "Contract authority" requires "not only authority to enter into a contract, but authority to do so *without regard to the availability of appropriations*." *Id.* at 6-51 (emphasis added); see 1 *GAO Redbook* 2-6. By specifying in a statute that the "authority" of an agency "to enter into contracts" is conditioned on the availability of appropriations, *e.g.*, 25 U.S.C. 1658, Congress makes clear that the agency lacks "contract authority" to bind the government without regard to appropriations.

that function. 25 U.S.C. 450j(c) ("The amounts of [self-determination] contracts shall be subject to the availability of appropriations."). Section 450j-1(b) addresses "the provision of funds" by the Secretary rather than the authority of the Secretary to "enter into a contract," and far from merely a *limit* on the ability obligate the fisc, it is an affirmative *grant* of authority to the Secretary to adjust funding levels based on appropriations. 25 U.S.C. 450j-1(b); see 25 U.S.C. 458aaa-18(b) (same).

c. The legislative history surrounding the enactment of the availability clause in 1988 reinforces that it was intended to do more than limit the agency's ability to obligate the fisc. The draft legislation before the Senate Select Committee on Indian Affairs did not contain the "availability" and "reduction" clauses ultimately codified in Section 450j-1(b), but it did contain the separate availability provision codified in 25 U.S.C. 450j(c). See S. Rep. No. 274, *supra*, at 79. In response to the provisions that added funding for CSCs, see p. 6, *supra*, the Director of IHS expressed concerns that those "costs would be more than the IHS would have available for the program's direct operation" and that "IHS would be required to obtain the funds from elsewhere in the IHS system." S. Rep. No. 274, *supra*, at 57. The Director supported "changes in the bill that would allow a small reduction in contract funding" to "allow IHS to pursue equitable distribution of funding," and he stated that the agency would assist "in devising language to that effect." *Ibid.*

BIA likewise sought to "clarify" in the legislation "that requested contracts are subject to the availability of funds for the program or portion thereof involved and that the Secretary is not required to divert funds from BIA operated programs or portions thereof serving other Indians to fund[] the requested contract." S. Rep. No. 274, *supra*, at 48. In addition, the Congressional Budget Office, in discussing the budgetary implications of the CSC provisions, observed that

"[b]ecause IHS and BIA activities are discretionary and must be funded through subsequent appropriations action, this language could have the effect of requiring contract costs to be met first and limiting funding for remaining activities within IHS and BIA," *id.* at 42—*i.e.*, the position urged by the Tribes.

After those concerns had been expressed, and in apparent response to them, the House of Representatives added the "availability" and "reduction" clauses now codified in Section 450j-1(b). H.R. 1223, 100th Cong., 1st Sess. § 205 (1988). Congress's evident purpose was to ensure that the ISDA did not "have the effect of requiring contract costs to be met first and limiting funding for remaining activities within IHS." S. Rep. No. 274, *supra*, at 42.

d. Congress also made clear elsewhere in the ISDA that it did not intend to require full funding of CSCs in advance of other priorities. In the same 1988 amendments that added provisions allowing for funding of CSCs, Congress required the Secretary to submit an annual report setting forth, *inter alia*, "an accounting of any deficiency in funds needed to provide required contract support costs to all contractors for the fiscal year for which the report is being submitted." 25 U.S.C. 450j-1(c). There would have been no need for that provision if Congress intended that the Secretary would be required to pay CSCs in full from the lump sum appropriation in advance of competing demands.

In addition, the annual $7.5 million appropriation for the ISD Fund in the relevant fiscal years indicates that Congress did not consider the Secretary legally bound to pay full CSCs before allocating the remainder of the lump-sum appropriation. The appropriations act for each relevant year specified that $7.5 million "shall remain available" for CSCs for new and expanded contracts. See pp. 11-12, *supra*. An appropriation in the "'shall be available' family of earmarking language presumptively 'fences in' the earmarked sum

(both maximum and minimum)." 2 *GAO Redbook* 6-8. But under the Tribes' view that the appropriation only operated as a minimum (Br. 35-37), if Congress believed that the Secretary was obligated to pay CSCs in full, there would have been no need for Congress to specify that $7.5 million was to be used to pay CSCs associated with new or expanded contracts.[17]

Finally, when Congress in 2000 permanently codified the self- governance provisions for IHS, it intentionally included the same availability language as appears in Section 450j-1(b). See 25 U.S.C. 458aaa-18. By that time, the Secretary's administration of ISDA funding and interpretation of the availability clause were well established. By enacting the same language in the self-governance provisions, Congress indicated its approval of the Secretary's interpretation. See *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").[18]

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[17] It is true that the $7.5 million appropriation not only earmarked a particular amount but also specified that any unused funds would "remain available" in subsequent fiscal years. *E.g.*, Department of the Interior and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-212, 3009-213. But IHS had established the queue system and had consistently exhausted the $7.5 million appropriation before the end of each fiscal year, a fact of which Congress presumably was aware. See S. Rep. No. 319, *supra*, at 90 (referring approvingly to IHS Circular 96-04, which continued queue system). Accordingly, under the Tribe's reading of the appropriation, the sole practical purpose of earmarking $7.5 million was to require the Secretary to spend that amount on CSCs for new and expanded programs, a purpose incompatible with any belief that enactment of the lump-sum appropriation *automatically* entitled the Tribes to full funding of CSCs.

[18] In 2000, the House Committee on Resources reported favorably on proposed legislation that would have excised the availability clause from the ISDA and would have established a legal entitlement to full funding of

2. The Tribes' interpretation of the appropriations acts is erroneous.

a. The Tribes argue (Br. 25, 30) that their interpretation of the availability clause is bolstered by language in the annual appropriations acts stating that "funds made available to tribes and tribal organizations through contracts * * * authorized by the [ISDA] shall be deemed to be obligated at the time of the grant or contract award and thereafter shall remain available to the tribe or tribal organization without fiscal year limitation." *E.g.*, Department of the Interior and Related Agencies Appropriations Act, 1994, Tit. II, Pub. L. No. 103-138, 107 Stat. 1408. According to the Tribes, because the funds were "deemed to obligated at the time of the grant or contract award," the appropriations acts themselves established a requirement to fund CSCs in full.

That argument lacks merit. That the "funds made available" through self-determination contracts are "deemed to be obligated" sheds no light on the *amount* of funds so obligated. And there is no suggestion in the appropriations acts of an intention to require that any particular sums be obligated to self-determination contracts. Compare, *e.g.*, 107 Stat. 1408 ("of the funds provided, not less than $11,526,000 shall be used to carry out the loan repayment program under section 108 of the Indian Health Care Improvement Act, as amended"). The evident purpose of the "deemed to be obligated" language is to establish that the "funds made available to tribes"—whatever the amount—are obligated and "shall remain available" for that purpose and thus are immune from administrative deobligation and reprogramming to a different purpose. See 2 *GAO Redbook* 7-51 to 7-53 (discussing deobligation by agency).

CSCs. See H.R. Rep. No. 837, 106th Cong., 2d Sess. (2000). Congress did not enact the legislation.

b. There likewise is no merit to the Tribes' reliance (Br. 29) on the fact that Congress included a "not to exceed" cap on CSC funding in the BIA appropriation in the relevant fiscal years, or that Congress in later years began including such a cap in IHS's appropriation. The question in this case is not whether IHS was *prohibited* from paying full CSCs in the relevant years, but whether the agency was *required* to do so. And for the reasons explained, the ISDA's availability and reduction clauses as well as its provisions concerning inherent federal functions establish that the Secretary was not required to pay full CSCs to Tribes ahead of all other demands on IHS's scarce resources. Given the litigation that had nonetheless arisen over whether IHS was required to fund full CSCs, it is understandable that Congress would choose to ensure that result in the future by enacting an explicit statutory cap in the appropriations acts.

II. SECTION 314 OF THE 1999 APPROPRIATIONS ACT BARS THE TRIBES FROM RECOVERING CONTRACT SUPPORT COSTS FOR FISCAL YEARS 1994-1998

A. Section 314 Establishes That The Secretary Was Not Required To Distribute Additional CSC Funds In The Relevant Years

In Section 314 of the 1999 appropriations act, Congress provided that, "[n]otwithstanding any other provision of law," the "amounts appropriated to or earmarked in committee reports for the * * * Indian Health Service" for "payments to tribes * * * for contract support costs * * * are the total amounts available for fiscal years 1994 through 1998 for such purposes." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-227, § 314, 112 Stat. 2681-288. In each of the fiscal years referenced by Section 314, the appropriations act allocated $7.5 million to the ISD Fund for CSCs associated with new and expanded contracts, and the committee reports ear-

marked a total sum to be spent overall on CSCs. The Secretary in turn distributed corresponding amounts of CSC funds to contracting Tribes. See J.A. 218 ¶ 17, 302 ¶ 24. Section 314 operates to establish that the sums distributed by the Secretary "are the total amounts available" for CSCs in those years. 112 Stat. 2681-288.

By using the term "available" in Section 314, Congress directly tracked the terms of Section 450j-1(b)'s availability clause and the contractual provisions implementing the clause. That clause renders "the provision of funds" by the Secretary for CSCs "subject to the availability of appropriations." 25 U.S.C. 450j-1(b). When Congress directed in Section 314 that the amount of funds for CSCs distributed by the Secretary in the relevant fiscal years "are the total amounts available for those years," Congress directly ratified the Secretary's decision to distribute those, and only those, amounts.

The legislative history of the 1999 appropriations act confirms that understanding. The Senate Report expressed "concern[] about continuing and growing funding shortfalls in contract support costs," and observed that "in several cases the Federal courts have held the United States liable for insufficient CSC funding." S. Rep. No. 227, 105th Cong., 2d Sess. 51-52 (1998). In the same appropriations act, moreover, Congress enacted a one-year moratorium on payment of CSCs for new and expanded contracts, and Congress also, as it had done for the first time the previous year, placed an explicit statutory ceiling on IHS's funding for CSCs. See p. 14, *supra*. Congress's purpose in Section 314 was to clarify the limits on the funds available to Tribes for CSC funding in fiscal years 1994 to 1998. See H.R. Rep. No. 609, *supra*, at 124 ("Section 314 limits payments for contract support costs in past years to the funds available in law and accompanying report language for those years.").

B. The Tribes' Interpretation Of Section 314 Is Incorrect

1. The Tribes argue that Section 314 was intended only to establish that, during fiscal year 1999, the agency was prohibited from using any leftover funds from fiscal years 1994 to 1998 to pay for CSCs for those years. But "Congress plainly said that the appropriated amounts were the total amounts available. Congress did not say that it meant only to restrict the Secretary's authority to spend unobligated balances." *Shoshone-Bannock Tribes*, 279 F.3d at 668.

The Tribes' argument that Section 314 is limited to addressing the use of leftover balances also cannot be squared with the fact that Congress has reenacted the provisions of Section 314 in each subsequent appropriations act. *E.g.*, Pub. L. No. 108-108, § 308, 117 Stat. 1303.[19] The authority to use leftover balances from a particular fiscal year expires after a five-year period, at which time the accounts are closed and any remaining funds revert to the Treasury. See 31 U.S.C. 1552(a). Congress nonetheless has specified when reenacting the provisions of Section 314 in later years that the provisions apply to all preceding years beginning with 1994. See, *e.g.*, 117 Stat. 1303 ("amounts appropriated to or earmarked in committee reports * * * for payments to tribes and tribal organizations for contract support costs * * * are the total amounts available for fiscal years 1994 through 2003 for such purposes"). If Congress's sole intention in Section 314 was to prevent the use of leftover balances, there would be no reason for Congress to apply its

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[19] See Department of the Interior and Related Agencies Appropriations Act, 2000, Pub. L. No. 106-113, § 313, 113 Stat. 1501A-192; Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, § 312, 114 Stat. 988; Department of the Interior & Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, Tit. II, 115 Stat. 456; Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, Div. F., Tit. III, § 308, 117 Stat. 271.

provisions to fiscal years for which the five-year period has elapsed and the accounts have been closed.

2. There is no merit to Tribes' argument (Br. 40-41) that the government's understanding of Section 314 raises serious constitutional questions. The Tribes principally rely on this Court's decision in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). As the Court has explained, however, "[w]hatever the precise scope of *Klein*," it has no application when Congress "changes the law (even if solely retroactively)." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995); see *Robertson* v. *Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992).

Before Section 314, the amounts earmarked for CSCs in the committee reports for the relevant fiscal years had not been enacted by Congress, although they furnished a proper framework for the Secretary's allocation of the lump sum appropriation among programs serving individual Tribes. Section 314 "changed the law" by incorporating those earmarks into positive law, and clarifying that the earmarks are the total amounts available for CSCs in the specified years. See, *e.g.*, *Red Lion Broadcast. Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). Congress thereby removed any doubt about the propriety of the Secretary's allocation.[20] Congress did not purport to direct any court to reach a particular result in any pending case, and Congress of course can change the law in a manner that affects ongoing litigation.

The circumstances here are in the nature of situations where Congress retroactively ratifies agency action that Congress could have authorized at the time the action was taken. This Court has found it "elementary" that Congress possesses such a "power of ratif. ation." *United States* v.

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[20] That allocation of course was independently supported by the provisions of the ISDA that set aside funds for inherent federal functions and that prevent reductions in programs for some Tribes in order to furnish funds to others. See pp. 27-45, *supra*.

Heinszen & Co., 206 U.S. 370, 382-388 (1907) (upholding retroactive ratification of tariff that was illegal when exacted); see *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 301-303 (1937); *Rafferty* v. *Smith, Bell, & Co.*, 257 U.S. 226 (1921). Cf. *United States* v. *Carlton*, 512 U.S. 26 (1994). Such ratifications apply to cases pending on the date of enactment and eliminate a right to relief that would otherwise exist. *Heinszen*, 207 U.S. at 384-391; see *Swayne & Hoyt*, 300 U.S. at 301-302.

In this case, similarly, even if the Secretary initially erred in funding CSCs at the levels earmarked in the committee reports, the furnishing of funds in that manner under the agreements with individual Tribes was at all times "subject to the availability of appropriations," notwithstanding any other provision in the ISDA. 25 U.S.C. 450j-1(b). Congress could have capped CSC funding at those levels by including such a provision in the appropriations acts rather than the committee reports. In Section 314, Congress ratified the Secretary's actions taken under longstanding budgeting practice and an allocation framework of which all Tribes were fully aware from the outset of the funding year. From that point forward during the fiscal year, the Tribes could elect to discontinue performing services under their agreements with IHS if they were dissatisfied with the level of funding for their CSCs. See pp. 4-5, *supra*. Nothing in the Constitution prevented Congress from ratifying the Secretary's allocation practices in response to the questions that had arisen from the competing demands of individual tribal programs. Congress's ratification, under this Court's decisions, applies to pending lawsuits. *Heinszen*, 207 U.S. at 384-391; see *Swayne & Hoyt*, 300 U.S. at 301-302.[21]

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[21] The Tribes argue (Br. 40) that they gained a vested and indefeasible entitlement to full payment of CSCs upon enactment of the lump sum appropriation in each year from 1994 to 1997, and that Congress could not abrogate that entitlement retroactively. Even assuming the Tribes could

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit in *Cherokee Nation* v. *United States*, No. 02-1472, should be affirmed, and the judgment of the Federal Circuit in *Thompson* v. *Cherokee Nation*, No. 03-853, should be reversed.

Respectfully submitted.

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assert a constitutional challenge in these circumstances, cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 323-324 (1966) (States are not "persons" protected by the Due Process Clause of the Fifth Amendment), the Tribes' expectation of CSC funding—given the availability clause in the ISDA and the Tribes' agreements with IHS—was always contingent on the availability of appropriations. In these circumstances, under a government-to-government program in which Tribes stepped into the shoes of IHS in administrating federal programs *as* a government, the Tribes did not acquire vested rights of the sort that could defeat Congress's constitutional authority to enact a curative statute to resolve ongoing issues concerning the allocation of funding under the overall IHS program. See *Swayne & Hoyt*, 300 U.S. at 302-303; *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-19 (1976). Cf. *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 53-56 (1986) (Congress reserved authority to amend Social Security Act and that power extends to agreements with States entered into in conformity with the Act).